No. 20,993

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCOTT LUMBER COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court's memorandum sustaining the Government's authority to condemn easements across appellant's land appears at pages 153-159 of the transcript of record; its memorandum denying appellant's motion for new trial on the issue of compensation is set forth at pages 236-253 of that record. 1/

1/ To avoid confusion, we follow appellant's practice (Br. 2) of referring to the transcript of record prepared by the clerk as "Tr." and to the reporter's transcript as "R."

JURISDICTION

The jurisdiction of the district court over this condemnation action is founded on 28 U.S.C., sec. 1358. Final judgment was entered January 7, 1965 (Tr. 207). Appellant's timely motion for new trial was denied December 28, 1965 (Tr. 253). Notice of appeal was filed February 15, 1966 (Tr. 254) The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the district court correctly entered summary judgment sustaining the Government's right to condemn, as a matter of law, where the only contested factual issues pertained to the necessity for condemnation.

2. Whether the district court erroneously departed from the pretrial order in striking the valuation testimony of one of appellant's witnesses.

3. Whether the district court erred in ruling, on appellant's motion for a new trial, that the valuation opinions of the Government's witnesses were based on permissible assumptions.

4. Whether there was error in the district court's comments and instructions to the jury.

STATEMENT

This condemnation proceeding was instituted by the United States to acquire easements across appellant's timberland "for the construction, maintenance, and permanent use of highways for the purpose of removing timber and other products from the Shasta-Trinity National Forests and for use in the conservation, preservation, protection and general administration of said forests, and for all other lawful purposes" (Tr. 2). The immediate area involved is, in general, owned (alternately by sections) by the United States and private interests (R. 18; Br. 11). The easements condemned (on 23 acres) embraced existing timber-hauling roads across a section of land (Section 31) owned by appellant and extended for a short distance on each side of the roads (Exhibit G).[2/] The existing roads which varied in width from 9 to 16 feet had been built by the United States Forest Service in 1929 or 1930 (R. 224, 1153). The additional strips condemned on each side of those roads were for widening the roads up to a 26-foot width and for appropriate safety zones (R. 1155-1156; Exhibit G).

2/ Because the existing roads, although connected, crossed appellant's land in three segments, the areas taken, embracing these segments, were denominated Parcels 1, 2 and 3, respectively, in the condemnation complaint (Tr. 4, 6, 7). The section of land owned by appellant contained 897 acres (R. 220).

The land involved is mountainous and deep within the external boundaries of the national forest. The old, existing roads and their connections with roads on other properties (federal and private) were used by appellant and others in the area to haul timber out to mills for processing. The new roads to be built by the Forest Service, pursuant to this acquisition, would be considerably wider and give better access to the Government's timberlands. In addition, a purpose of the new roads "was to assure not only ourselves [Forest Service] but the private owners that there was ready, undeniable access through this area from one end to the other. The problem, as far as the Forest Service is concerned, is that we will not sell Government timber until there is public right of way so you'd have a free and unrestricted competitive bidding" (R. 1148). Otherwise, owners of roads on private lands can and do set their own prices for allowing timber to be hauled over them (R. 1148).

The United States filed a declaration of taking at the time of the filing of the complaint in condemnation (May 18, 1960), with a deposit into court of estimated just

compensation (Tr. 153). Thereupon, the district court entered an order for delivery of possession (Tr. 153-154). The litigation then proceeded in two phases:

First, by answer to the complaint and by motion to vacate the order of possession with numerous affidavits, appellant challenged the authority to condemn, alleging that the Government did not need an unrestricted easement which would allow the general public to use the roads and that its property was not being taken for a public use, but to benefit other (competing) private timber operators in the area in hauling out timber from Government lands (Tr. 50-51, 153-155). Accordingly, it alleged that there was no statutory authority for the taking. In response, the Government, by motion for an order determining a preliminary legal question, urged the court to rule on whether the taking was within the legislative authority set forth in the complaint and declaration of taking (Tr. 137). Its stated position was that, if the taking was authorized by that statutory authority, then appellant's allegations, which relate solely to the necessity for the taking, must fail as a matter of law. The district court ruled

(a) that, as conceded by appellant, "a taking for a road on which to haul Government timber would ordinarily be classified as a taking for a public use," (b) that the court lacked the power to determine the quantum or location of the estate to be taken as sought by appellant and (c) that the fact that building the new road would open up heretofore inaccessible areas of (competing) private timberland, as well as Government timberland, and would make it possible to haul such timber to a particular private mill do not tend to show that the taking is arbitrary, capricious, in bad faith or for private purposes, but relate, rather, to forest management purposes which are matters exclusively for the Forest Service, not the courts, to determine (Tr. 153-159).

On this basis, the court on March 23, 1961, granted the Government's motion for an order determining the preliminary legal question (that the taking is for a public purpose) and denied appellant's motion to vacate the order for possession (Tr. 158). Then, the court deeming that this result called for summary judgment on that issue entered such a judgment on March 31, 1961, sustaining the authority to condemn (Tr. 160). It held that there was no genuine issue of material fact bearing on the matters resolved, that the

purpose of the taking alleged in the complaint was clearly a public use and that the charges of arbitrary action or bad faith in the record cannot (as a matter of law) upset the executive determination as to the necessity for the taking for a clear public purpose.[3/]

The second phase of the litigation related to the issue of just compensation. At the outset, the parties stipulated that the value of the timber taken within the easement area was $21,809 on May 18, 1960, the date of taking (Tr. 239). This left for the jury the determination of the monetary loss in market value, if any, to appellant's land as a result of the imposition of this new road easement, excluding the timber loss.

Appellant offered the valuation testimony of two witnesses, Sanders and Wall. But, on motion by Government counsel, following their testimony, the court struck their valuation opinions because the basis for their opinions was legally erroneous for reasons to be discussed in the Argument (Tr. 243). The court noted that Sanders admitted that he made

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3/ The court viewed the "facts alleged by Scott, taken in the light most favorable to Scott" (Tr. 155).

no effort to investigate forestland or forest land and young growth timber (Tr. 243). Rather, he constructed a value by addition and subtraction of component parts or "assets." Part of these additions and subtractions were based on pure speculation (Tr. 243). He did not value the whole which was taken, but made a summation of estimated values of the parts (Tr. 244). The court allowed him to return and value the timber alone, provided his figure would be used by another expert in an over-all valuation. But no other witness made use of this valuation, so that figure was stricken. The witness Wall, the court noted, made numerous erroneous assumptions and omissions which admittedly had important bearing on value (Tr. 245-246). The court concluded that his valuation would be confusing rather than helpful to the jury (Tr. 245).[4/]

The Government's two valuation witnesses testified (Tr. 242) that, if timber on the easement area were to be excluded from the over-all value because of the stipulated figure for it of $21,809, then appellant should receive $591

4/ To avoid repetition, further details concerning the exclusion of the valuation opinions of these witnesses are set out in the Argument, infra.

(Linnville) or $691 (Howell) as a result of loss of control of the private road because of the taking. The jury returned an award of $691 (Tr. 206) which gave total compensation in the sum of $22,500 ($691 plus $21,809). Judgment was entered in that amount (Tr. 207) and thereafter a motion by appellant for a new trial, extensively briefed and argued, was denied (Tr. 217-253). This appeal followed (Tr. 254).

SUMMARY OF ARGUMENT

I

The district court correctly entered summary judgment sustaining the Government's authority to condemn as a matter of law. The taking of property within the external boundaries of a national forest for a road on which to haul government timber and for forestry management purposes is a public use and is authorized by statute. Appellant's factual allegations pertaining solely to the wisdom for the taking presents nothing for a court to determine. That is exclusively an administrative matter. The fact that the taking of property from one party may bestow a benefit on another private party is of no legal significance.

II

A. The district court did not erroneously disregard the pretrial order. Appellant contends that the court erred in permitting and requiring consideration of the right of the Southern Pacific Land Company to use the existing road over appellant's land, because the pretrial order, while specifying another such interest, did not specify that interest. But appellant did not object at the trial to a showing of Southern Pacific's right. There was no surprise. Clearly, it was not the intention of the parties in settling the pretrial order to have definitively set forth the status of the title to the exclusion of several known, claimed interests.

B. The Government's valuation witnesses did not make erroneous assumptions.

1. The record is clear that the valuation opinions by the Government's witnesses, based on immediate harvest of the merchantable timber, was not in violation of the California Forest Practice Act.

2. Their valuations on the basis of "the highest and most profitable use" of appellant's property was correct and is the same standard, in federal condemnation law, as "the highest and best use" urged by appellant.

3. The Government's valuation witnesses weighed proper factors in considering the extent of the use that appellant and others could make of the new Forest Service Roads.

III

There was no error in the district court's comments and instructions to the jury. They were correct and in all respects fair. There were no essential omissions. Appellant's failure to request or object to instructions before retirement of the jury is clearly fatal to its present attempt to urge error as to the instructions.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY ENTERED SUMMARY JUDGMENT SUSTAINING THE GOVERNMENT'S RIGHT TO CONDEMN

Appellant contends that the district court erred in entering summary judgment sustaining the authority of the

United States to condemn its property in this case, because there were genuine issues of material facts as to whether the taking was for a public purpose (Br. 10-11, 14).[5/] Appellant then proceeds to assert facts and conclusions from those facts, as it did in affidavits and other papers below, which, it contends, raise factual issues that should have been resolved (Br. 11-14). The "facts" asserted seek to show (1) that the Government's building of the new road will benefit appellant's competitors in the area and (2) that "condemnation was not necessary either to build a road or to move Government timber over the road * * * the existing road system was adequate for these needs" (Br. 12-13).

But, as the district court said (Tr. 154): "It is conceded by Scott that a taking for a road on which to haul Government timber would ordinarily be classified as a taking for a public use. That is the avowed purpose of the taking in this case." The complaint so stated (Par. 3 at Tr. 2) and ample congressional authority to condemn for this purpose was

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5/ Appellant states that the case "should have gone to the jury for a determination as to whether the taking was for a private purpose" (Br. 14). But Rule 71A(h), F.R.Civ.P., governing federal condemnation trials, after providing for trial by jury or commission of the issue of "just compensation," states: "Trial of all issues shall otherwise be by the court." Hence, under any view, this issue should not have gone to the jury. United States v. 91.69 Acres in Oconee County, 334 F.2d 229 (C.A. 4, 1964).

alleged (Tr. 1-2). Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257; Act of June 4, 1897, 30 Stat. 34-36, 16 U.S.C. secs. 475 and 476; Act of August 27, 1958, 72 Stat. 885, 906-907, 23 U.S.C. secs. 203 and 205; Act of June 23, 1959, 73 Stat. 92, 103-105. It is clearly a constitutional purpose. U.S. Constitution, Article IV, sec. 3, cl. 4.

The facts and conclusions sought to be litigated by appellant pertain exclusively, in one form or another, to the need of the Government to condemn appellant's property for this purpose. But as the Supreme Court said in Joslin Co. v. Providence, 262 U.S. 668, 678 (1923):

> That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. Adirondack Ry. Co. v. New York [176 U.S. 335], 349; Shoemaker v. United States, 147 U.S. 282, 298; United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 685; Boom Co. v. Patterson, 98 U.S. 403, 406. * * *
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> The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.

See also Berman v. Parker, 348 U.S. 26 (1954); U.S. ex rel. T.V.A. v. Welch, 327 U.S. 546, 552 (1946); Rindge Co. v. Los Angeles, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919).

Where a valid public purpose is stated by the administrative officer to whom Congress had delegated a particular program or function to effectuate that purpose and his actions will or can serve that purpose, the courts cannot inquire into his intentions in order to find a different purpose. Southern Pacific Land Company v. United States, 367 F.2d 161 (C.A. 9, 1966), cert. den., 35 Law Week 3392; United States v. Montana, 134 F.2d 194, 196-197 (C.A. 9, 1943), cert. den., 319 U.S. 772; City of Oakland v. United States, 124 F.2d 959, 964 (C.A. 9, 1942), cert. den., 316 U.S. 679. The fact that the taking of property from one party may bestow a benefit on another private party is of no legal consequence. Berman v. Parker, 348 U.S. 26 (1954); United States v. Marin, 136 F.2d 388 (C.A. 9, 1943); United States v. 243.22 Acres of Land in Babylon, N.Y., 129 F.2d 678, 683 (C.A. 2, 1942), cert. den., sub nom. Lambert v.

United States, 317 U.S. 698. Appellant's charges of "arbitrary and capricious" actions come to no more than disagreement with the administrative decision. Cf. Chapman v. Public Utility District No. 1 of Douglas Co., Wash., 367 F.2d 163 (C.A. 9, 1966).

It is undeniable that these new roads give access or improved access to government timberlands and serve forestry management purposes. Hence, they serve a public purpose authorized by Congress. Appellant's desire for a different administrative determination respecting the necessity for acquiring its lands on which to construct them presents nothing for court review. Accordingly, summary judgment was correctly entered.

II

THERE WAS NO ERROR IN THE DISTRICT COURT'S RULINGS ON THE TESTIMONY OF THE VALUATION WITNESSES

Introductory: Appellant states in its brief (p. 43): "From the very outset of this case one receives the strident attitude that the Government need not justify the taking of private land, and that adequate compensation is whatever the Government feels should be paid, supported by the testimony

of experts hired for this purpose. The patronizing attitude of the Government in this case was indeed shocking." The fact of the matter is, as stated by government counsel during argument on appellant's motion for a new trial on the valuation issue (Reporter's Transcript on Motion for New Trial, pp. 102-103):

> We spent three weeks of trial in this [valuation] matter of which the Government utilized only two and one-half days. The Court, I think, was overly lenient with Defendant and its counsel in allowing time and again efforts to introduce evidence in support of their so-called valuation of just compensation, and we allowed the witnesses to come back time after time in an effort to do this, and we did many things that I think were not required of the Court nor required of counsel for the Government in order to allow some evidence to remain for the Jury to have by way of valuation testimony on behalf of the Defendant. The fact that they were unsuccessful in accomplishing this is in no way the fault of the Court or counsel for the Government, and I feel that merely because the experts adduced on behalf of the Defendant were improperly informed or followed a legally impermissible approach and were not allowed to render their final opinion does not per se entitle these defendants to a new trial. They have had more than their day in Court * * *.

In short, the case is simply an attempt by appellants to create a claim to substantial compensation where the conversion of a private road to an improved public road caused no loss to appellant.

A. The Rulings with Respect to Appellant's Valuation Witnesses.

Appellant makes a repeated reference to the district court's striking of the valuation testimony of its witnesses, Sanders and Wall (Br. 4, 6, 24, 41), but only argues one ground of criticism of that action; namely, the court's alleged disregard of a pretrial order -- with respect to the testimony of Wall (Br. 14-23).[6/] Before dealing with that contention, it should be observed that the court relied on numerous other independent bases for striking the valuation conclusions of Wall (Tr. 245, 247; R. 1108-1116, 1529-1542, 1581-1582, 1596-1605, 1662-1666). These related principally to matters forming the basis for his opinion which had no foundation whatever in objective facts. As the court said, he was "using

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6/ Appellant's quarrel with the court's instructions to the jury (Br. 40-42) do not bear on the validity of the court's striking the valuation testimony of these two witnesses and will be dealt with later.

anything anybody would suggest to him as being a good idea rather than his determining what a prudent purchaser would really have in mind on the day that he made the purchase" (R. 1600). To mention but one instance, he included in his land valuation calculations the sum of $37,500 as a "contingency item" for "unforeseen expenses and costs" that would result from the condemnation (R. 866-867, 1035-1037). This was pure unsupported speculation and conjecture pulled out of the air (R. 1531-1532, 1585-1587, 1602-1603). As the court said of his testimony generally (R. 1581): "I was frankly disturbed as we [went] through with his examination to find him saying time after time, 'No, I didn't investigate that. No, I didn't look into that. No, I didn't talk to those people,' and so forth." Appellant does not raise and, hence, apparently concedes the validity

of this and the other grounds (except the pretrial order) for excluding his valuation conclusions. 7/

Appellant's argument (with respect to Wall) asserting a disregard of the pretrial order lacks merit. The pretrial order recited that appellant owned the fee simple title to Section 31 "subject, however, to certain easements and rights of way vested in Defendants, R. G. Watt

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7/ Appellant presents no argument at all about the validity of striking Sander's valuation testimony. The court leaned over backwards trying to have this witness lay a proper foundation for expressing an opinion of value. He was repeatedly allowed to be recalled for that purpose (R. 272-455, 537-603), but could never establish an existing or acquired knowledge of land values in the area (R. 455-537, 1095-1104; Tr. 243-245). In addition, as the court said (R. 378): "He takes the before value and then he merely deducts the assets that he thinks have been taken away and throws some costs in there." That is not an acceptable appraisal of market value. Finally, in an ultimate effort to allow his testimony to be used, the court permitted him to testify to the value of the timber alone, provided some over-all appraiser would later make use of his figures (R. 537-603), but since no appraiser did, that testimony had to fall, because in federal eminent domain proceedings land must be valued as a unit (R. 1666-1668). It may not be valued as a total of its parts (Tr. 243-245). Morton Butler Timber Co. v. United States, 91 F.2d 884 (C.A. 6, 1937); United States v. Meyer, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den., 311 U.S. 706; Fain v. United States, 145 F.2d 956, 958 (C.A. 6, 1944); Kinter v. United States, 156 F.2d 5 (C.A. 3, 1946).

and Alice McCourt Lamm" and that they "have previously appeared in this proceeding and have disclaimed any further interest in the estate condemned and in the amount to be awarded for the taking herein" (Tr. 195, 239). Because of that specific reference to the Watt and Lamm interests only, appellant urges that it was error for the court to permit the Government to show by deeds (Exhibits 1 and 2) that the Southern Pacific Land Company also had a reserved right to use the logging roads across appellant's land and, further, it was error for the court to use Wall's lack of knowledge of that right as one of the many grounds for excluding his opinion of value. The harm to the theory of appellant's case in this respect arose from the fact that appellant sought to show that, before the taking, it had virtually complete control of its roads so that it could block them, pile logs upon them, etc.; whereas, after the taking, it lost this allegedly valuable right. The existing rights of the Southern Pacific Land Company, in addition to those of Watts and Lamm, to use the roads diluted this exclusivity and, hence, had a bearing on that theory of value asserted.

As grounds for error, appellant urges surprise, an inability to cure the omission by Wall because his testimony and the striking of it came at the end of appellant's case, and failure of the court to impose protective terms when it thus departed, as alleged, from the pretrial order. But, as the district court said (Tr. 247): "If there had been objection at the time of trial, then the matter could have been dealt with at that time. If convinced that defense counsel was surprised, then possibly a protective order could have been made as suggested by defendant's memorandum."[8/] The interest of Southern Pacific came up on the first day of the three-week trial and the deeds showing the reservation were received in evidence at that time with no objection (R. 66-84; Tr. 241, 247). Mr. Wall was not called on until the ninth day after that (R. 745).

In any event, there was no departure from the pretrial order. The record is clear (Tr. 238, 247, fn. 1) that

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8/ This subject was not specified in appellant's motion for a new trial and was not raised in appellant's opening memorandum supporting that motion. It was an afterthought even subsequent to that (Reporter's Transcript on Motion for New Trial, pp. 98-99; Tr. 241).

the reason for specifying the Watt-Lamm interests in the pre-trial order was a request from their attorney for "the pre-trial order to spell out a little more explicitly that the taking herein does not operate to extinguish the right of way interest of the Watt-Lamm people * * * in the event the Government does abandon its right of way." They disclaimed "any and all right, claim or interest they may have in and to the compensation or any part thereof to be awarded for the estate and interest taken in this proceeding, or for any damages incident thereto," but wanted their reversionary interest to remain (Tr. 193e, 238-239). This was taken care of by an amended complaint preserving all reversionary rights (Tr. 193c, 238).

The pretrial order does not state that theirs was the only interest to encumber appellant's title. Any statement that it was the only interest would have been untrue on the face of the record, because Southern Pacific Land Company had previously filed the disclaimer specifically asserting its interest in the property but waiving any right to a portion of the condemnation award (Tr. 188). There were also other defendants with known interests in the roads who

waived compensation (Tr. 240). The memoranda filed by both the Government and appellant prior to the pretrial hearing made no mention that condition of title would be a subject of discussion at the hearing (Tr. 190, 193a, 248). The Government's memorandum merely stated that it was anticipated that the Watt-Lamm interests would be settled before the pretrial hearing (Tr. 192, 248). It is not sensible to believe that the parties intended to set forth in the pretrial order all outstanding interests in these circumstances. Accordingly, we submit that there was no error in the district court's ruling. 9/

9/ Unlike appellant (Br. 20), we espouse rather than depreciate the court's statement that the opinion of an "expert witness is only as good as the reasons that back it up." "Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts on which it is based." State of Washington v. United States, 214 F.2d 33, 43 (C.A. 9, 1954), cert. den., 348 U.S. 862. "* * * an opinion is no better than the hypothesis or the assumption upon which it is based." International Paper Co. v. United States, 227 F.2d 201, 205 (C.A. 5, 1956). "Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings." United States v. Honolulu Plantation Co., 182 F.2d 172, 178 (C.A. 9, 1950), cert. den., 340 U.S. 820; Atlantic Coast Line R. Co. v. United States, 132 F.2d 959, 963 (C.A. 5, 1943).

Contrary to appellant's implications (Br. 19-20), there is no evidence that Southern Pacific's easement was not in full force as shown in the deeds (R. 1663-1664). An understanding of appellant's employees that "the Southern Pacific easement had been cleared away by the title company" (Br. 19) is not such evidence.

B. The Rulings with Respect to the Government's Valuation Witnesses.

1. The California Forest Practice Act. Appellant contends that the district court erred in permitting the Government's witnesses to give valuation opinions based on "cut out and get out" timber harvesting in violation of the California Forest Practice Act (Br. 24-29). It must be noted here that the term "cut out and get out" is a term coined by appellant's counsel and was never used by any of the Government's witnesses. Appellant implies from this term that the Government's witnesses were suggesting that the purchaser of this property should "clear cut" the timber. "Clear cutting" means to cut the timber indiscriminately without reference to its size or merchantability. This practice is in violation of the California Forest Practice Act. The record in this case clearly demonstrates that neither Mr. Howell nor Mr. Linville testified that they were of the belief that a purchaser of this property could or would "clear cut" the land. On the contrary, both witnesses referred to and relied upon Mr. Bunting's timber cruise and valuation of Section 31 (R. 1257, 1294-1295, 1299, 1420-1421, 1456) -- a copy of which was furnished appellant prior to trial (Tr. 192) - wherein

Mr. Bunting conducted a cruise of and expressed his opinion as to the value of the "merchantable timber," i.e., that timber which could be cut in accordance with the general practice in the area and the pertinent California laws. This cruise was the same type of cruise conducted by Mr. Sanders and the one used by Mr. Wall (appellant's witnesses). The matter is made crystal clear by the statement of Chief Forester Stathem (R. 1193): "You could cut down to the allowable limits within the State Forest Practices Act and this would, in my mind, be by far the most profitable use of this section" (Cf. R. 1172, 1277-1278).

It is true that the Government's witnesses appraised the property on the basis of a "full cut" or immediate harvest. But that does not mean a harvest in violation of law. It was their opinion that the "highest and most profitable use" of the property -- the use which gave it the greatest value in the market -- was a purchase for immediate harvest of the merchantable timber.

2. The Most Profitable Use. Appellant's criticism of the Government's witnesses and the court (Br. 29-37) on the quibble that "highest and most profitable use" is not the

same in federal condemnation law as the "highest and best use" is unsupportable.[10/] The quotation from Olson v. United States, 292 U.S. 246, 255 (1934), at page 33 of appellant's brief is a complete answer to this. See also the many cases on this point listed in 20 Modern Federal Practice Digest, Eminent Domain, Sec. 134, pages 521-524. The effort to find an "economic" point of view in "profitable" and a "conservation" point of view in "best" overlooks the fact that in federal eminent domain valuations the sole end sought is "market value." United States v. Miller, 317 U.S. 369 (1943); Olson, supra, pp. 246, 257. Indeed, it is nothing nobler or baser than the price which would result from "the haggling of the market." Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949). This gives compensation fair to both parties. The "most profitable use," stated in Olson, means "the best economic use" to assure reaching the full fair market value.

The district court correctly instructed the jury in that respect. It said (R. 1680-1681):

10/ If "best use" could be considered not to be the "most profitable use" the rule urged would operate to the benefit of the Government, not landowners.

In using fair market value to assist in determining just compensation, the test is not the value of the property for any such purpose; it is the fair market value of the property considered in the light of all the purposes to which the property is naturally adaptable both before and after the taking. It is the highest value in terms of money which the property will bring at the two points of determination, namely, before and after the taking if exposed to sale for cash at each of those two moments in the open market in the community in which the property is situated with a reasonable time to find a purchaser buying with full knowledge of all of the uses or purposes for which it is adapted and for which it is being used, the seller being fully informed and not being required to sell and the buyer being fully informed and not being required to buy at that time. In this sense, the phrase, "Market value," is synonymous with "actual value."

In fixing the fair market value of the lands in question you may and should consider the highest and best use to which this land was adaptable at the time of taking. By the term, "highest and best use," as used in determining market value, we mean the highest and most profitable use for which the property is adaptable and for which there is a demand in the market considerable enough to influence its market value. The property's highest and best use does not depend on the use to which the Defendant-Owner, Scott Lumber Company, may have devoted this land at the time of taking, nor upon the plans that it may have envisioned for this property.

It was the opinion of the Government's witnesses that the highest and most profitable useof this land was a sale for immediate harvest. They were entitled to believe this and to testify to that effect. There is no basis for requiring them (Br. 35-37) to testify on the basis of a "sustained yield" concept which they expressly did not believe would produce the highest market value (cf. Tr. 248-249). But even so, if appellant believed that the jury should have been instructed otherwise or more fully (Br. 22-23 35-37), it should have requested such an instruction. Rule 51, F.R.Civ.P.

3. Use of the Special Service Roads. Appellant asserts that the district court erred in not commenting on or striking the testimony of the Government's valuation experts because they assumed incorrect facts concerning appellant's allowable use of the new roads (Br. 37-40). The thrust of this contention is that there is a conflict between the written terms of the Special Use Permit (under which appellant will use the new roads), providing for termination "at the discretion of the Regional Forester or the Chief, Forest Service" and that the "road shall be open at all times to the free use of the public," and the testimony of the Government's witnesses to the effect that there would be very little change

in the utilization of the road from that existing before. Again, appellant's objection comes late. There was no motion made to strike the testimony on this ground and no request for comment or instruction to the jury.

But, even so, there is no merit to the point. The terms of the Special Use Permits were put in evidence for the jury to consider -- by the Government (Exhibit 3; R. 237, 240, 1204). The Government's witness, Stathem, Forest Supervisor of the Shasta-Trinity National Forests, merely explained how the terms of the permits had been construed and applied and how he was applying them (R. 1123-1235). Appellant's counsel cross-examined him extensively on this subject (R. 1194-1232). Mr. McArdle, Chief of the U.S. Forest Service at the date of taking, and Mr. Peterson, Assistant Secretary of Agriculture, also testified (by deposition) as to the purposes and applications of the terms of Special Use Permits (R. 1237-1244). The Government's valuation witnesses took all of this (the permits, the past experience and the present official intentions as to the future) into account in forming their opinions of value. There was no error in this. Indeed,

that was precisely what they should have done in seeking to fix the price which a hypothetical buyer and seller would agree upon. They were all valid considerations for appraisers and for the jury. The matter was correctly put in its proper perspective by the court in its instructions to the jury (R. 1684):

> In spite of the fact that the evidence shows that as of May 18, 1960, the Government had made a determination that no charge would be made to Scott Lumber, its successors or assigns for any part of the construction cost of the new road as it might be charged to the timber taken from Section 31, this does not mean that the Government could not at a later date change its policy in this regard. You must take this possible change -- you may take this possible change of policy into account in determining fair market value, that is, you may consider this possibility if you reach the opinion that a prospective purchaser, while he was reaching a decision as to the fair market value of Section 31 after the take as of 12:01 p.m., May 18, 1960, might consider it reasonably probable in the forseeable future that there would be such a change.

III

THERE WAS NO ERROR IN THE COURT'S INSTRUCTIONS TO THE JURY

Appellant's variety of statements and charges on this subject in the last two points of its brief come to nothing (Br. 40-42). Thus, appellant complains that "in commenting on the evidence the Trial Judge referred only to the testimony of Defendant's valuation experts" (Br. 40). The answer is that at that time, having just granted a motion to strike their valuation opinions, that was the only proper subject for the court's comments. Appellant states that the remarks were "so inflammatory" that its counsel "immediately objected" (Br. 40). Counsel did promptly object, but to the "rulings," not to the remarks as such. The court very fairly replied for the jury to hear (Tr. 1669): "Very well. Mr. King has stated it and I don't think I could state it any better than that. He has taken exception to my rulings and he has a perfect right to do so representing Scott Lumber Company, and those exceptions are in the record."

Appellant explains "the feeling" of the jury as a result of the striking of the opinion valuation of its witnesses ("castigation") and uses the court's instruction concerning the burden of proof and weight of the evidence as a matter which "enhanced and fed" that feeling (Br. 40). We submit that the court's remarks plainly did not castigate appellant's witnesses, but merely explained in objective terms the reasons for striking their testimony (R. 1662-1668). For example, the court said (R. 1666): "Now, this does not mean that the rest of Mr. Wall's testimony may not be considered by you and given whatever weight you feel it deserves in light of other instructions I may give you. And, further, I want to instruct you that I do not mean to impugn Mr. Wall's integrity in any way that he was trying to put something over." The court's instruction that the burden to prove the amount of compensation was on the landowner and his definition of weight of the evidence were purely routine, required, and wholly correct (R. 1681). United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 273-274 (1943).

Appellant complains of "the timing" of the court's remarks striking the valuation opinions "just before the instructions" (Br. 41). The "timing" was merely that the court ruled on motions by both parties to strike certain testimony made at the end of the trial (R. 1520-1612, 1693). There was nothing for the court to rule on prior to that (R. 1693). While it is true, as appellant says (Br. 41), that valuation was the only issue in the case at this time, it is not true that all testimony of all its witnesses were thus stricken. There was a great deal of appellant's testimony concerning description of the property, quantity and quality of timber, location of markets, market conditions, logging practices, past and prospective uses of the property, etc. (in addition to its cross-examination of the Government's witnesses) which was not removed from the jury. The jury did not arrive at its award in the amount testified to by one of the Government's witnesses in "a very short time" (Br. 41). It deliberated for nearly six hours (Reporter's Transcript on Motion for New Trial, p. 103).

Appellant's last point (Br. 41-42) urges error in the failure of the court to instruct the jury along the lines

of the rest of the argument in its brief which we have heretofore dealt with. We have shown that the positions taken by appellant lack merit and, hence, any instructions based on them would not have been correct. In addition, we have shown that appellant's failure to request or object to instructions prior to retirement of the jury is clearly fatal to its present attempt to urge error in these respects. Rule 51, F.R.Civ.P.; Christensen v. Trotter, 171 F.2d 66 (C.A. 9, 1948); Southern Pacific Co. v. Villarruel, 307 F.2d 414 (C.A. 9, 1962). As this Court said in Bock v. United States, 375 F.2d 479, 480 (1967):

> Rule 51 provides that a party may not complain of the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection. * * * and it is firmly established in this circuit that "the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused." Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960), cert. denied, 365 U.S. 816 (1961); Hargrave v. Wellman, 276 F.2d 948 (9th Cir. 1960).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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JULY 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

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